Supreme Court, U.S.
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Nos. 00-1770, 00-1781

In The

Supreme Court of the United States

OAKLAND HOUSING AUTHORITY
AND HAROLD DAVIS,

Petitioners,

v.

PEARLIE RUCKER, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

Respondents' primary argument is based on the erroneous assumption that 42 U.S.C. § 1437d(l)(6) should be read "in pari materia" with 21 U.S.C. § 881(a)(7). This is not true where, as here, Congress' intent is clear and unambiguous. This view is buttressed by legislative history and statutory context. This Court should not look to 21 U.S.C. § 881(a)(7) in seeking Congress' intent to resolve the question presented. Civil forfeiture is a tool used by law enforcement agencies, not PHAs, to punish through forfeiture of all property used to make the illegal drug trade easier.

A. The Language Of The Statute Is Clear And Unambiguous.

The parties are in agreement that this case is governed by *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). As such, if Congress has spoken to the issue before the Court, the Court must give effect to Congress' unambiguously expressed intent. If Congress has not spoken, or if its comment is unclear, then this Court must defer to HUD's permissible construction of the statute. Here, there is no dispute that Congress has spoken regarding section 1437d(l)(6). Accordingly, unless respondents demonstrate that Congress unambiguously embraced their interpretation, HUD's interpretation resolves this dispute. Here, neither the statute, nor HUD's interpretation, includes an ignorant tenant defense.

Respondents seek to avoid HUD's controlling interpretation by citing *FDA v. Brown & Williamson Tobacco*

Corporation, 529 U.S. 120, 132 (2000), and claiming the Court is required to look beyond 42 U.S.C. § 1437d(l)(6) to determine if Congress has spoken to the issue before the Court or, if in speaking, Congress has spoken ambiguously. However, if Congress has not spoken, or has spoken ambiguously, HUD's permitted interpretation controls. Respondents can prevail on this point only if they can show that Congress clearly expressed an intent contrary to HUD's interpretation, something they cannot do even if the Court were to consider other unrelated statutes such as 21 U.S.C. § 881(a)(7). *Chevron*, 476 U.S. at 843 n.9.

No authority has been presented showing Congress even hinted, let alone clearly stated, it intended that tenants be able to avoid eviction under section 1437d(l)(6) by proving ignorance of the activities giving rise to the eviction. Accordingly, and at a minimum, if ambiguity exists as to Congress' intent, we must defer to HUD.

Brown & Williamson does not compel a contrary result. First, and as this Court stated, *Brown & Williamson* was an extraordinary case. The FDA asserted jurisdiction over the tobacco industry, which it had previously and expressly claimed it could not regulate. That event compelled this Court to look further to discern whether Congress had spoken to the issue of jurisdiction. Under those facts, and given tobacco's unique political history, the Court did not confine itself to examining a particular statutory provision in isolation. But, the Court confined its inquiry to those statutes specifically on point, the FDCA's overall regulatory scheme and tobacco-specific legislation enacted by Congress subsequent to the FDCA. *Brown & Williamson*, 529 U.S. at 125. Hence, the Court's

review here should be restricted to harmonizing section 1437d(l)(6) with the Housing Act, and other eviction-specific legislation. It should not extend its inquiry to civil forfeiture statutes that are unrelated in scope and purpose.

United States v. Monsanto, 491 U.S. 600 (1989) and *United States v. Gonzales*, 520 U.S. 1 (1997) are instructive and respondents' attempt to distinguish these cases is unpersuasive. As in *Monsanto*, respondents attempt here to create an exception to a "plain and unambiguous" statute. *Monsanto*, 491 U.S. at 606. Here, respondents demand an *exception* from eviction under section 1437d(l)(6), if they prove they had no knowledge of the prohibited activity. In *Monsanto*, it was an exception from forfeiture of monies to be paid for attorney's fees. *Id.* As in this case, the statute in *Monsanto* lacked even a "hint" of such an exemption. *Id.* at 607. Rejecting respondent's argument the Court explained "Congress' intent is 'best determined by [looking to] the statutory language that it chooses.' " *Id.* at 610 (citation omitted). The Court also found that legislative comment was not helpful because Congress "refused to act on repeated suggestions by the defense bar for the sort of exemption respondent urges here." *Id.* (citation omitted). The court in *Monsanto* concluded that "[t]he short answer is that Congress did not write the statute that way." *Id.* at 611, citing *United States v. Naftalin*, 441 U.S. 768, 773 (1979). Respondents' arguments should suffer the same fate as that in *Monsanto*.

The holding in *Gonzales* did not turn on whether the literal meaning of the statute avoided conflict with other federal statutes and/or avoided absurd results. The Court said "given the straight forth statutory command, there is

no reason to resort to legislative history." *Gonzales*, 520 U.S. at 6. Only the court of appeal in *Gonzales* was "troubled that this rule might lead to irrational results." This Court found that reasoning flawed, explaining that the plain reading of the statute as here, did not conflict with other statutes. *Id.* at 7-8.

B. Statutory Context Confirms An Ignorant Tenant Defense Is Unavailable.

1. The Omission Of A Knowledge Requirement Is Evidence Of Congress' Intent To Allow Evictions Of Ignorant Tenants.

The fact that Congress has not expressly enacted the ignorance defense sought by respondents "argues forcefully that such authorization was not its intention." *Omni International, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 106 (1987). In *Omni*, the Court found it significant that Congress expressly provided for nationwide service of process in certain of the Commodity Exchange Act's ("CEA") provisions but did not do so in section 22 of that Act. Indeed, noting that the newly amended section 22 was silent as to service of process, the Court rejected an argument similar to the one now made by respondents, i.e., that the provision reflected in other sections of a different statute was implied in the subject statute. *Omni* at 106.

Respondents nonetheless argue that here no evidence exists that Congress was aware of HUD's interpretation of section 1437d(l)(6) when it re-enacted the statute and, therefore, did not consciously act to omit an innocent

owner defense. Respondents' argument is contrary to *Omni* and is simply not supported by the record.

First, there is no claim in *Omni* that Congress was aware of any agency interpretation. As such, lack of Congressional knowledge is inconsequential. Second, legislative history shows that Congress was aware of and considered the ignorance defense. (See *infra*, subsection "C," below.)

2. The Forfeiture Statute Is Not Related To Section 1437d(l)(6).

The civil forfeiture statute and 42 U.S.C. § 1437d(l)(6) are different in scope and purpose. Forfeiture is a "powerful weapon that allows the government to seize profits and proceeds of illegal drug trafficking." *United States v. The Leasehold Interest in 121 Nostrand Avenue, Apt 1-C, Brooklyn, New York*, 760 F.Supp. 1015, 1026 (1991).

No authority, let alone *Brown & Williamson*, justifies reading the "innocent owner" defense into section 1437d(l)(6). There, the Court looked to subsequent and specifically related legislative acts by Congress. (*Brown & Williamson*, 529 U.S. at 133.) Here, respondents seek comparison of a public housing tenant's eviction under a lease to civil forfeiture. The proposition is simply not supported by *Brown & Williamson*.

C. Legislative History Supports Petitioners' Position That Ignorant Tenants Can Be Evicted.

"The constitution sets forth the only manner in which the Members of Congress have the power to impose their

will upon the country: by a bill that passes both Houses and is either signed by the President or repassed by a super-majority after his veto." *United States v. Estate of Romani*, 523 U.S. 517, 535-536 (1998). (Scalia, J. concurring in part and in the judgment.) "Everything else the Members of Congress do is either prelude or internal organization." *Id.*

Regulations and interpretations long continuing without substantial change, applying to unamended or substantially re-enacted statutes, are deemed to have received Congressional approval and have the effect of law. *United States v. Corello*, 389 U.S. 299, 305-306 (1967).

The fact that in the same year Congress enacted legislation to include "leaseholds" in civil forfeiture statutes and enacted 42 U.S.C. § 1437d(k) (1990), providing for a grievance procedure for residents evicted from public housing, does not mean Congress intended to provide an "innocent tenant" defense for section 1437d(l)(6). The two acts are not synonymous. Again, if Congress wanted to create the defense it knew how to do so. It did not. Instead, legislative history shows Congress had no intention of providing the defense.

Significant here is the enactment of 42 U.S.C. § 1437d(c)(4)(A)(iii) (1990), providing for a waiver of the waiting period for any member of a family of an individual prohibited from tenancy where the agency determines she "did not participate in and had no knowledge of such criminal activity. . . . " This reflects Congress' approval of the eviction of ignorant tenants.

The Dire Emergency Supplemental Appropriations and Transfers, Urgent Supplementals, and Correcting

Enrollment Errors Act of 1989, Pub. L. No. 101-45, § 404 ("Dire Emergency Act"), also fails to support respondents' proposition that Congress approved an unknowing tenant defense. (Resp. Br. at 13.) Although the Act speaks to protections for tenants who were not personally involved in drug-related activity, the protections ended after one year in 1990. *Id.* at § 404(b) 103 Stat. at 129. Again, it underscores petitioners' claim that Congress was aware of the concerns raised by respondents, but declined to provide the defense now sought.

Respondents' reliance on *Security & Exchange Commission v. Sloan*, 436 U.S. 103 (1978), lacks merit. The case in *Sloan* involved an SEC's contrary interpretation of a statute limiting the SEC's authority to suspend trading to ten days. The Court rejected the SEC's argument of "general congressional awareness of the Commission's construction based only upon a few isolated statements within thousands of pages of legislative documents." *Id.* at 121.

That is not the case here. First, unlike *Sloan*, HUD's interpretation is not contrary to Congressional statutes and re-enactments. Nor do petitioners contend Congress' awareness is based on a few isolated statements in the Congressional reports. Congress' awareness of HUD's interpretation of section 1437d(l)(6) is evident, not only through the Congressional record, but legislation adopted and repealed by Congress. (See Dire Emergency Act, *supra*, and 42 U.S.C. § 1437d(c)(4)(A)(iii) (1990).)

United States v. Calamaro, 354 U.S. 351 (1957), merely stands for the proposition that absent any congressional discussion accompanying a regulation, re-enactment is without significance. *Calamaro* at 358-359. That is not the

case here. Moreover, the footnote cited by respondents from *United States v. Powell*, 379 U.S. 48 (1964), is not relevant because this case does not involve an issue of judicial construction of a statute of "which [the Court] could be justified in presuming Congress, by its silence, impliedly approved." *Powell* at 55 n.13 (citation omitted).

D. The Eviction Of Ignorant Tenants Under The Statute Does Not Violate The Constitution.

1. HUD's Interpretation Does Not Violate Due Process Rights.

Respondents and amicus curiae contend that under HUD's interpretation of section 1437d(l)(6), tenants are denied due process because they are unable to raise an "affirmative defense" that they had no knowledge of the drug-related activity by a household member or guest. They argue by inference that an absence of this defense equates to deprivation of due process because "individual guilt . . . is fundamental to our concept of justice . . . ." (Brief Amicus Curiae of the American Civil Liberties Union, et al. at 6; Resp. Br. at 24.)[1]

However, "neither the language of the due process clause of the Fifth Amendment nor [the Court's] cases construing it require any such hobbling restrictions on legislative authority." *Arnett v. Kennedy*, 416 U.S. 134, 154 (1974).

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[1] Amicus curiae concedes the concept of guilt is only appropriate in criminal cases where some element of scienter is required to establish culpability or attachment of civil penalties. *Id.* Hence, it is not appropriate here.

In *Arnett*, petitioners argued that even though Congress chose to provide a benefit to governmental employees, e.g., security against being dismissed without "cause," Congress could not refuse them a full adversary hearing for the determination of "cause." *Arnett* at 147-150.

Respondents were never denied due process. Indeed, respondents' potential eviction under section 1437d(l)(6) commenced with Notices of Terminating Tenancy. (R. 40.) Thereafter, they refused to surrender the possession of their premises, and civil complaints for unlawful detainer were filed with the state court. (R. 31-39.) Although these state actions were stayed pending resolution of the subject action, had respondents proceeded with the unlawful detainer actions, they would have been provided their due process rights to be heard and offer evidence negating the evidence presented by OHA. The simple truth is they want more. They want the benefits of public housing without having to comply with the governing statute's conditions.

However, "[i]t is an elementary rule of constitutional law that one may not 'retain the benefits of an act while attacking the constitutionality of one of its important conditions.' . . . The court will not pass upon the constitutionality of a statute at the instance of one who has availed himself of its benefits." (*Arnett* at 152-153, citing *Fahey v. Mallonee*, 332 U.S. 245 (1974).)

In support of their due process argument, respondents analogize this case to others that are completely different in facts and law. The statutes criminalizing

members of subversive organizations resulted in depriving individuals of life, liberty and property under criminal statutes. *Scales v. United States*, 367 U.S. 203 (1961). Here, tenants are not subject to criminal punishment.

Moreover, this case is not similar to *Plyler v. Doe*, 457 U.S. 202 (1982), an equal protection case involving undocumented immigrant children being barred from public schools. Further, Congress never made findings that undocumented children presented any danger to, and/or threatened, the health and safety of others, as was done here.

a) Respondents' Adhesion Argument Is Not An Issue Before The Court.

Preliminarily, respondents did not raise state contract law issues below in support of their request for preliminary injunction. Nor, did respondents raise these contentions in their brief in opposition at the petition stage here. To raise any one of the contentions in this Court, including adhesion, forfeiture and ambiguity, in the first instance is inappropriate. (*Ramsey v. United Mine Workers of America*, 401 U.S. 302, 312 (1971). See also *Youkim v. Miller*, 425 U.S. 231, 234 (1986); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).)

Respondents claim that the subject leases are unenforceable under California law as they are contracts of adhesion containing unconscionable terms is not before the Court. (Resp. Br. at 42.) The request for an injunction was not based on this claim. Additionally, the district court below dismissed respondents' "unconscionable" contract claim as preempted. See *Gibbons v. Ogden*, 22 U.S.

1, 210 (1824); *Free v. Bland*, 369 U.S. 663, 666 (1952); *Industrial Truck Assoc., Inc. v. Henry*, 125 F.3d 1305, 1309 (9th Cir. 1997). (R. 168.) Moreover, a contract which is required by law to include certain terms cannot be construed as unconscionable. *Drennan v. Security Pacific Nat. Bank*, 28 Cal.3d 764, 621 P.2d 1318, 170 Cal.Rptr. 904 (1981).

b) Respondents' Forfeiture Argument Is Not Before The Court And Lacks Merit.

Respondents cite to *Keating v. Preston*, 42 Cal.App.2d 110, 108 P.2d 479 (1940), is incomplete and misleading. In *Keating*, a lessor attempted to terminate a lease based on a statute relating to gambling. In addressing the "implied covenant" issue, the *Keating* court said "a lease may be terminated only when it is procured by fraud, for lack of consideration or for breach of expressed or implied covenants contained in the instrument." *Keating*, 108 P.2d at 483. Here, the subject leases contained expressed covenants. *Keating* therefore supports the termination of the leases in this case.

California Civil Procedure section 1179 and *Thrifty Oil Co. v. Batarse*, 174 Cal.App.3d 770, 220 Cal.Rptr. 285 (1985) do not alter the outcome here. Relief is available under C.C.P. § 1179, only on the condition of *full performance of stipulated conditions or covenants*. (Emphasis added.) That does not exist here.

c) Respondents' Ambiguity Argument Is Not An Issue Before The Court And Lacks Merit.

The issue of ambiguity is not before this Court. This issue was never pled in the underlying complaint[2] and there is no evidence respondents did not understand paragraph 9(m) of their leases and the related documents. Hence, the issue of ambiguity is not before the Court and the argument lacks merit.

2. The Purpose Of The Housing Act Justifies The Evictions Of Ignorant Tenants.

Respondents dispute petitioners' justifications for evicting ignorant tenants illogically contending there is no incentive for a tenant to insure prohibited conduct does not occur even if threatened with eviction. The risk of losing one's living unit for engaging in prohibited activity clearly is incentive to assure the activity does not occur. Moreover, respondents cannot seriously argue that the law does not encourage other tenants to provide information for evictions under the statute. Certainly, the fears that other public housing residents have voiced about testifying against a tenant for drug-related activity is not conjecture. These fears are reflected in the findings of Congress that precipitated the statute at issue in this action. (See 42 U.S.C. § 11901. See also *Drugs in Federally Assisted Housing: Hearings on F.566 before the subcomm. on*

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[2] The district court granted leave to respondents to amend the underlying complaint to state a cause of action for an ambiguous contract. (R. 169.)

Housing and Urban Affairs of the Senate Comm. On Banking, Housing, and Urban Affairs, S. Doc. No. 101-234, at 27 (1989).) Tenants are now free to come forward with information without fear that they will be required to testify at trial.

To the extent HUD suggests possible alternatives to the eviction of an entire household, e.g., eviction of the specific household member who engaged in drug activity, the suggestions merely support petitioners' position that PHAs have discretion and are encouraged to consider numerous factors before evicting for drug-related activities.

Equally without merit is respondents' assertion that HUD's grading process for PHAs takes away any discretion to evict under the statute. Under the former PHMAP, and the current PHAS, HUD takes into consideration several factors related to management operations including vacant unit turnaround time, fund work, responses to emergency work orders, annual inspection of units and security. The security factor addresses a PHA's performance in tracking crime, reporting crime and the adoption and implementation of policies related to screening applications and evictions. (24 C.F.R. § 902.43(5) (2001); 24 C.F.R. § 901.45(c) (1996).)

PHMAP and PHAS encourage PHAs to adopt policies and implement procedures in order that evictions can be accomplished properly and legally. Respondents' allegation that HUD unnecessarily encourages PHAs to evict under section 1437d(l)(6) simply lacks merit.

3. Eviction Under The Statute Does Not Constitute An Unconstitutional Forfeiture Of The Property Right.

Respondents argue that the results from eviction under section 1437d(l)(6) and forfeiture of property under the civil forfeiture statutes are the same – tenants lose their leasehold. Hence, the defenses available under the civil forfeiture statutes should apply to evictions based on section 1437d(l)(6). This analysis is too simplistic.

Section 1437d(l)(6) and section 881(a)(7) utilize different mechanisms and have different purposes. Section 1437d(l)(6) is designed to insure that public housing tenants are provided safe, affordable and decent housing and that the scarce supply of housing is properly allocated. Section 881(a)(7) is principally designed to allow law enforcement agencies to frustrate the drug trade by confiscating the tools, monies and property involved. 21 U.S.C. § 801. (H.R. Rep. 106-192, P.L. 106-185 (1999)). Moreover, all right, title and interest in seized property vests in the United States. *Id.*

Because of the enormous revenue that has been generated and government's "increasing and virtually unchecked use of the civil forfeiture statutes," Congress passed legislation providing the "innocent owner" defense for civil forfeitures. (H.R. Rep. No. 106-192 at 5-6, 15.)

The same types of unchecked abuses and attendant enrichment cannot be found under section 1437d(l)(6), where the interest in the public housing property reverts back to the original owner, the local PHA, who, in turn, provides housing for other needy families. The PHA

gains no advantage, monetary or otherwise, from utilizing eviction under section 1437d(l)(6).

Respondents' reliance on *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663 (1974) and *Austin v. United States*, 509 U.S. 602 (1993), both civil forfeiture cases, is misplaced. Neither is an eviction case. Moreover, these cases were decided prior to this Court's decision in *Bennis v. Michigan*, 516 U.S. 442 (1996). *Bennis* held that property could be forfeited even if the owner was not involved and unaware her property was being used in connection with illegal activity. *Bennis*, 516 U.S. at 450. Clearly, under *Bennis*, the application of section 1437d(l)(6) to unknowing tenants is constitutional.

4. Eviction Is Remedial, Not Punitive, Therefore, It Is Not An Excessive Fine In Violation Of The Eighth Amendment.

Eviction under section 1437d(l)(6) is remedial in nature and not related to the goal of compensating the government for investigative and enforcement expenses. *City of New York v. Wright*, 162 Misc.2d 572, 573-574, 618 N.Y.S.2d 938 (1994).

PHAs do not have the power to punish and gain no monetary enrichment in terminating a lease only to provide the unit to another family on a long waiting list. The benefit, if any, is to tenants who no longer live in fear of illegal drug activity and to a family who can now receive a home from scarce resources. The purpose behind eviction is remedial, not punitive, and does not constitute an excessive fine. *Austin v. United States*, 509 U.S. 602, 609

(1993); *Browning-Ferris Industries of Vt., Inc. v. Kaeco Disposal, Inc.*, 492 U.S. 257, 266-267 (1980).

E. The Statute Protects Family Units.

Respondents' argument that the subject policy is "profoundly anti-family" completely lacks merit. First, it is the drug-related activity, not the eviction policy that threatens the family units. Second, it is respondents' interpretation of the statute that results in the division of family units. The examples are numerous. Suffice it to say, unsanitary conditions, constant fear of violence, and other atrocious living conditions, significantly interferes with a family's right to enjoy a safe and decent place to live.

There is simply no other way to interpret the policy herein, but that it has the purpose of protecting the family.

CONCLUSION

The Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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